




760 SW Ninth Ave., Suite 3000
Portland, OR 97205


www.stoel.com


ERIC L. MARTIN


eric.martin@stoel.com

October 24, 2019

VIA EMAIL ELISABETH.PEREZ@PORTLANDOREGON.GOV
BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Ms. Elisabeth Perez
Interim Director
Office for Community Technology
City of Portland, Oregon
111 SW Columbia Street, Suite 600
Portland, OR 97201

Re: October 18th Denial Under Zenith Energy Terminals Holdings LLC's Franchise Agreement

Dear Ms. Perez:

The Office for Community Technology's ("OCT") denial late last week of Zenith Energy Terminals Holdings LLC's ("Zenith") submission under Section 2.1(C) of its franchise agreement (Ordinance No. 188554, as amended by Ordinance No. 189149) conflicts with Resolution No. 37168 and the terms of that franchise agreement with the City. In fact, **the OCT's decision undermines Resolution No. 37168 by establishing that no one can develop facilities in City rights-of-way to transport renewable fuels** and by inhibiting continued diversification of the terminalling services that Zenith can provide from its Portland terminal. If the OCT does not approve Zenith's submittal by October 31, 2019, Zenith is prepared to commence action against the City to protect its right under the franchise to install new pipelines for the transportation of petroleum, petroleum products, liquid intermediates, and/or renewable fuels.

We understand from your October 18 letter that the OCT denied Zenith's submission for three new pipes for the transportation of biodiesel, renewable diesel, and MDI under NW Front Avenue because (i) the pipes would be "physically capable" of transporting fossil fuels and Resolution No. 37168 opposes the expansion of fossil fuel transportation infrastructure, and (ii) the OCT has neither staffing nor expertise to ensure that these new pipes will not be used to transport Zenith's customers' fossil fuels and the OCT believes it cannot rely on franchisee reporting. However, as you are no doubt aware, biodiesel, renewable diesel, and MDI are not fossil fuels, these pipes will not be placed into fossil fuel service, the OCT is empowered and responsible under the Portland City Code and the franchise itself for monitoring franchise compliance, and practicing any fraud or deceit against the City would be grounds for revocation

of the franchise. Accordingly, the OCT's denial is not based on any relevant facts or meritorious legal arguments.

As explained to Mr. Robert Taylor (Office of the City Attorney) this summer, a pipe is simply a pipe; a pipe is physically capable of transporting a variety of liquids and gases. This fact was reflected in Zenith's September 6th response to Mr. Taylor's question of whether the new pipes would be "capable of being used, or converted to be used, to transport fossil fuels." The mere fact that a pipe is "physically capable" of being used to transport multiple substances provides no basis for the OCT's denial. Resolution No. 37168 is directed at new infrastructure "whose primary purpose is transporting or storing fossil fuels"; it is not directed at facilities, like the pipes at issue here, that are simply physically capable of transporting fossil fuels but would not be built or operated for that purpose. As made plain in Zenith's materials, the purpose of this project is the transportation and storage of renewable fuels and a non-fuel liquid intermediate.¹

By denying development of facilities that would "accelerate the transition to non-fossil fuel energy sources," the **OCT has twisted Resolution No. 37168 to realize a result that the City Council expressly sought to avoid when it approved Resolution No. 37168.** Indeed, as the OCT must now deny any and every submission it may receive going forward for any facility physically capable of transporting fossil fuels, **no one will be able to develop facilities in City rights-of-way to transport renewable fuels. This result is utterly at odds with Resolution No. 37168.**

Furthermore, the City Council found, when approving Zenith's franchise in 2017, that the franchise's terms and conditions are consistent with Resolution No. 37168. Those terms and conditions expressly contemplated that Zenith can "amend, alter or add" to its "Pipeline System" for the transportation of petroleum and petroleum products but only within the limited franchise area. One year later the City Council approved an amendment that broadened the definition of "Pipeline System" to include renewable fuels and liquid intermediates. For this reason, among others, Resolution No. 37168 cannot serve as a basis for denying what the subsequent franchise expressly allows within the franchise area. Zenith proposed a condition in a good-faith effort to address City concerns about fossil fuels,² but that condition is not required for approval here as Resolution No. 37168 does not limit Zenith's rights under the franchise agreement.

¹ This project would not increase the quantity of fossil fuels passing through Zenith's terminal. Zenith's existing renewable fuel terminalling business does not utilize pipes within the NW Front Avenue right-of-way. Accordingly, construction and operation of these pipes under NW Front Avenue would facilitate growth of that renewable fuel terminalling business.

² Zenith proposed the condition in response to the following questions from Mr. Taylor: "How can the City be assured with absolute confidence that the proposed new pipes will never be used to transport fossil fuels?" and "How can the City be assured with absolute confidence that the addition of the new pipes will not increase the

Ms. Elisabeth Perez
October 24, 2019
Page 3

As to the OCT's lack of staffing and expertise, neither party's respective rights and responsibilities under the franchise are governed by, or in any way subject to, the other party's staffing levels and expertise. Indeed, we are frankly surprised that the OCT, which falls under Mayor Wheeler's oversight, lacks the ability to fully monitor franchise compliance and never inspects any franchise facilities when the OCT is responsible for "monitoring the performance of all franchisees for franchise compliance."³ If the OCT lacks the ability to actually perform that fundamental function, it is incumbent upon the City to remedy that deficiency; it provides no basis to deny Zenith from moving forward with this project.

Zenith adamantly rejects your statement that Zenith has "struggled" to comply with the franchise. Zenith has safely operated the pipes subject to the franchise and timely responded to every request from the City for information. The City's remedies for noncompliance are governed by Section 9 of the franchise agreement, rather than Section 2.1(C), and Zenith is entitled under Section 9 to notice and an opportunity to cure before the City takes any action adverse to Zenith. The City has never previously communicated any issues or concerns about Zenith's compliance with the franchise and has certainly never issued a notice of default under Section 9. The annual franchise filing and fee, which is the only example cited in your letter, requires an inflation adjustment that OCT staff committed, consistent with its practice in prior years, to provide Zenith in April 2019.⁴ To Zenith's knowledge, the OCT did not transmit that information to Zenith until October 21, 2019. Zenith has now paid the fee and made the filing. Zenith has been open and upfront with the City⁵ and plans to continue doing so.

Zenith will not hesitate, though, to protect its rights, particularly as the OCT's denial lacks any credible basis and conflicts with Zenith's rights under the franchise. We remain open

availability or capacity of the existing pipe infrastructure to transport fossil fuels?". "Absolute confidence" is not an approval criterion under the franchise agreement, and to Zenith's knowledge, the OCT has never required "absolute confidence" in connection with any other franchise or approval thereunder.

³ Portland City Code 3.114.020.B ("The Office [for Community Technology] shall be responsible for supervising and coordinating all franchising processes engaged in by the City, for monitoring the performance of all franchisees for franchise compliance and for performing all other necessary work relating to franchises in the City."); Ordinance No. 188554, Section 12.7(B) (OCT is "responsible for . . . monitoring the performance of all franchisees for franchise compliance . . . and performing all other necessary work relating to City franchises.").

⁴ November 22, 2017 email from Joshua Eddings, Program Specialist, OCT Utility Franchises, Licenses & Wireless ("[W]e will provide the CPI in approximately April 2019" for the franchise fee and annual report due May 15, 2019).

⁵ Contrary to the misinformation campaign that continues to be waged against Zenith in Portland, Zenith's September 6th response to Mr. Taylor's questions expressly stated that the new pipes will be insulated and heat traced. This allows MDI-100, which is a solid at room temperature but a liquid when heated, to be transported by pipeline.

Ms. Elisabeth Perez
October 24, 2019
Page 4

to discussing these matters with the City, but if the OCT does not approve Zenith's submittal by October 31, 2019, Zenith is prepared to commence action against the City to protect the rights granted by the City Council through the franchise agreement. This letter, therefore, also serves as notice to the City, whether or not required by law, of Zenith's claim against the City for its violation of the franchise agreement. All responses to this letter should be sent to me at the address on the first page of this letter.

Sincerely,



Eric L. Martin

cc: Office for Community Technology (Via Email ComTech@portlandoregon.gov)
City Attorney's Office (By Certified Mail, Return Receipt Requested)
Mayor Ted Wheeler (Via U.S. First Class Mail)
Rebecca Esau, Director, Bureau of Development Services (Via Email Rebecca.Esau@portlandoregon.gov)
Maja Haium, Office of the City Attorney (Via Email Maja.Haium@portlandoregon.gov)
Robert Taylor, Office of the City Attorney (Via Email Robert.Taylor@portlandoregon.gov)
Chris Warner, Director, Portland Bureau of Transportation (Via Email Chris.Warner@portlandoregon.gov)